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In The

Supreme Court of the United States

MYLES TAMASHIRO, WARREN TOYAMA, HEATHER FARMER, FILO TU, JEANETTE TU, LYNN MISAKI, CLYDE OTA, MIRIAM ONOMURA, and YOSHIKO NISHIHARA,

Petitioners,

v.

DEPARTMENT OF HUMAN SERVICES, STATE OF HAWAII, STEPHEN TEETER, JOE CORDOVA, DAVE EVELAND, and LILLIAN B. KOLLER,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Hawaii

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Hawaii may lawfully require that a licensee dissatisfied with any action arising from the State's program for blind vendors must pursue specified administrative remedies before seeking judicial intervention.

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OPINIONS BELOW

The opinion of the Supreme Court of Hawaii is reported at 146 P.3d 103 (2006) and 112 Haw. 388 (2006). The decision of the state trial court – the Hawaii Circuit Court of the First Circuit – is not reported.

JURISDICTION

The Supreme Court of Hawaii issued its opinion on October 27, 2006 and its judgment on December 4, 2006. After two extensions of time were granted, the petition was filed on March 15, 2007. As discussed below, the presence of state law grounds for the judgment below casts doubt on this Court's jurisdiction under 28 U.S.C. § 1257(a).

STATEMENT

1. Congress enacted the Randolph-Sheppard Act (RSA or Act) in 1936, amended it in 1954, and amended it again in 1974. The 1936 version of the Act allowed blind persons to operate vending stands in federal buildings at the discretion of the building management. The 1954 amendments conferred a preference on blind persons to operate vending stands in federal buildings.

In 1974, Congress further expanded the Act, upgrading the blind vendor preference to a priority and introducing the provisions at issue here. Pub.L. No. 74-732, §§ 1-7, 49 Stat. 1559, 1559-60 (1936); Pub.L. No. 83-565, § 13, 68 Stat. 652, 663-65 (1954), 20 U.S.C. § 107 to § 107(f).

First, Congress added new section 107d-3, which entitles states that participate in this federal scheme to receive income from unassigned vending machines on federal property.[1] To participate in this scheme, and receive this federal money, a state must set up a federally approved "state licensing agency" ("SLA"). Section 107b of the Act standardizes the process for a state agency to apply for the SLA designation from the federal Secretary of Education and requires the applicant state to agree to six separate conditions as a condition for receiving federal money. One condition is that the applicant SLA must issue regulations necessary for the operation of the program. 20 U.S.C. § 107b(5).

Another condition is that the applicant SLA must agree:

> to provide to any blind licensee dissatisfied with any action arising from the operation or administration of the vending facility program an opportunity for a fair hearing, and to agree to submit the grievances of any blind licensee not otherwise resolved by such hearing to arbitration as provided in section 107d-1 of this title.

20 U.S.C. § 107b(6). Section 107d-1 specifies that the "fair hearing" referred to in § 107b(6) is a full evidentiary hearing. It also specifies that if any "blind licensee is dissatisfied" with the "result of such hearing, he may file a complaint" with the federal Secretary of Education, "who shall convene a panel to arbitrate the dispute[.]" Section 107d-2 provides that this arbitration decision shall be

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[1] Each section of the Act corresponds to a section of Title 20 of the U.S. Code. Thus, section 107d-3 is codified at 20 U.S.C. § 107d-3.

subject to appeal as a final agency action under the judicial review provisions of the federal Administrative Procedure Act (5 U.S.C. § 701 to § 706). This three-step process is referred to below as the Act's "hearing-arbitration-review" procedure.

Hawaii participates in the federal program, and the Hawaii Department of Human Services (the Department) is the federally-approved SLA. In addition, the Hawaii legislature has separately enacted its own blind-vendor laws applicable to *state and county* buildings as well. *See* Haw. Rev. Stat. § 104-20; Haw. Admin. R. § 17-402-17. In its regulations implementing this state scheme, the Department adopted, as a matter of state law, the hearing-arbitration-review requirements contained in Section 107d-1 and 107d-2 of the federal Act. Haw. Admin. R. § 17-402-17(j). As a result, a Hawaii licensee's objections to implementation of the blind-vendor laws applicable in either federal or state and local properties are subject to the same dispute-resolution procedures.

2. Petitioners are blind licensees who were dissatisfied with the implementation of Hawaii's state scheme for vendor priority in state and local properties. In 1996, petitioners claimed that the Department had not placed vending machines in all eligible sites, such as police stations and fire stations, in the control of the City and County of Honolulu (the County). Petitioners did not request the hearing-arbitration-review procedure required under state law.[2] Rather, they sued respondents (the State)

[2] Petitioners did, however, request a declaratory ruling from the Department under the Hawaii Administrative Procedure Act (Hawaii Revised Statutes § 91-8) on the threshold state-law question of whether the Department could place vending machines in County buildings over

(Continued on following page)

and the County in Hawaii circuit court in July 1996. The complaint invoked the general civil jurisdiction of the Hawaii circuit courts and sought money damages, injunctive and declaratory relief, and attorneys' fees.

The circuit court granted petitioners' motion for summary judgment against the State as to liability and denied the State's motion for summary judgment based on the State's immunity from money damages under Hawaii Revised Statutes § 661-1 (the Hawaii Tucker Act). Following a bench trial on damages, the circuit court awarded petitioners $3.67 million for twenty years worth of compensatory damages and awarded over $600,000 for attorneys' fees. After trial, the State moved to dismiss the complaint for lack of subject matter jurisdiction based on petitioners' failure to comply with the hearing-arbitration-review procedure applicable to licensed blind vendors. The circuit court denied the motion.

On appeal, the Supreme Court of Hawaii reversed the circuit court's judgment for lack of subject matter jurisdiction. That determination rested on two independent grounds. First, the court held that "the overall scheme of the federal RSA dictates adherence to the federal adjudication path" – that is, the hearing-arbitration-review procedure – "even in those situations involving non-federal property." Pet. App. 30a; *see* pp. 10-14, *infra* (discussing

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the objection of the County. This lawsuit was stayed to await the declaratory ruling, which issued in 1997. The 1997 ruling confirmed that the Department had the authority to control the placement and income of vending machines in all state and county buildings. The County settled with petitioners in mid-1999, agreeing to comply with the declaratory ruling and to pay $150,000 in four annual installments of $37,500. The lawsuit then continued against respondents.

merits). As the court explained, Congress viewed that federal adjudication path as an important benefit for blind licensees, and it "intended the RSA program to apply to both federal and non-federal properties" to the extent that "funds derived from the operation of vending facilities on any federal property are used to establish or operate a blind vendor facility on non-federal property." *Id.* at 31a-32a.

Second, turning from what federal law requires, the court separately found that, as a matter of *state law*, Hawaii had chosen to maintain its sovereign immunity against ordinary civil litigation in state court, thus barring this action. Pet. App. 33a-48a. Specifically, the court held that the Department had state-law authority (under the Hawaii constitution and the relevant state statutes) to incorporate the federal adjudication path within the state scheme; that the Department exercised that authority when it promulgated Hawaii Administrative Rule § 17-402-17; and that Hawaii had thus waived "its sovereign immunity to suits in federal courts – not state courts – via the federal adjudication path." Pet. App. 39a; *see id.* at 40a-44a & n.21.

Two members of the Hawaii Supreme Court dissented on both the federal-law and state-law points. Pet. App. 59a-116a.

ARGUMENT

The decision below was correct; it creates no conflict of authority; and this case would present a poor vehicle for resolving any federal issue in any event. Certiorari should therefore be denied.

I. This Case Presents Substantial Threshold Obstacles To Review Of The Question Presented In The Petition

Petitioners claim that this case would enable the Court to vindicate "the Constitution's carefully crafted federal-state balance" enshrined in "the Eleventh Amendment" by shielding a state that participates in the Randolph-Sheppard scheme from "unwittingly waiv[ing] all rights to have state law causes of action against the State adjudicated in its own courts." Pet. 2; *see also id.* at 20-24. This case, however, would be an exceptionally poor vehicle for attempting to address that issue.

First, petitioners can hardly claim to speak for the interests of state sovereignty, given that they wish to thwart Hawaii's sovereign preference for addressing this type of dispute through the hearing-arbitration-review procedure rather than through ordinary civil litigation in Hawaii's state courts. As the Hawaii Supreme Court observed, Hawaii has "surrendered its sovereign immunity to suits in federal courts – *not* state courts – via the federal adjudication path." Pet. App. 39a (emphasis added). If this Court wishes to consider whether use of "the federal adjudication path" in this context *impairs* state sovereignty, it should defer review until a case in which the state litigant actually supports, rather than opposes, that position.

Second, any review of the question presented in the petition would likely founder on the complex interplay of federal and state law in this case. Although the first half of the Hawaii Supreme Court's decision holds that federal law requires participating states to adopt the hearing-arbitration-review procedure in this context, Pet. App. 25a-33a, the second half separately holds that the Department

validly exercised delegated authority under state law to incorporate the same procedure for disputes arising from the state program, *id.* at 33a-48a. Hawaii affirmatively embraces that uniform dispute-resolution approach: not because federal law requires it to do so, but because it prefers to use the same successful and well-established procedure for blind licensees operating in federal, state, and local office buildings alike. *See* pp. 9-10, *infra*.

Although the dissent below criticized the majority's state-law analysis at great length, Pet. App. at 83a-102a, that dispute is beyond this Court's jurisdiction. And because state law forms an adequate and independent ground for the judgment below, this Court could not appropriately resolve the federal question presented in the petition. *See, e.g., Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945) ("We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its view of federal laws, our review would amount to nothing more than an advisory opinion.").

II. The Decision Below Creates No Conflict of Authority

Despite petitioners' contrary claim, the decision below does not conflict with any decision of a federal court of appeals or of the highest court of any other state.

First, the decision in *New Hampshire v. Ramsey*, 366 F.3d 1 (1st Cir. 2004), is entirely consistent with the decision below. In that case, the plaintiffs (blind vendors) sued New Hampshire under the Surface Transportation Assistance Act ("STAA"), which applies the Randolph-Sheppard Act to the placement of vending machines at

interstate-highway rest areas. 23 U.S.C. § 111(b). As in this case, the vending machine sites at issue in *Ramsey* were state-owned. 366 F.3d at 11. And, consistent with the result below, the district court in *Ramsey* dismissed the suit for failure to invoke the hearing-arbitration-review procedure specified by the Act. *See id.* at 10.

The *Ramsey* plaintiffs then availed themselves of that procedure and won (among other things) prospective injunctive relief against the state in the arbitration proceeding. The district court affirmed that injunctive remedy. On appeal, the state argued "that the arbitration panel lacked authority to issue any relief at all because, as a matter of statutory construction, [the Randolph-Sheppard Act's] grievance procedures do not apply" to claims arising under the STAA. *Id.* at 22. The First Circuit rejected that claim on estoppel grounds (because the state had successfully moved for dismissal of the original suit for failure to comply with these same procedures) and alternatively held that, in fact, the Act's grievance procedures *do* apply to claims arising under the STAA. *Id.* at 22-24.

Nothing in that decision is at all inconsistent with the decision below. Petitioners nonetheless cite dictum in a footnote of the *Ramsey* opinion, which asserts in passing that when state agencies operate "vending machines on state property under the state's 'mini'-R-S Act. . . . they do so in their general capacity as agencies of the state, not in their capacity as licensing agencies designated under the R-S Act." *Id.* at 23 n.23. That remark, however, had nothing to do with the holding in *Ramsey*; indeed, New Hampshire had *abandoned* any claim that the hearing-arbitration-review procedure applies only to federal properties and not to state-owned properties. 366 F.3d at

22 n.22. And even if footnote 23 were the holding of *Ramsey* rather than offhanded dictum, it still would pose no conflict with the decision below. Whether or not federal law requires it to do so, Hawaii has voluntarily incorporated the Act's hearing-and-arbitration procedure into state law, and it has thereby signaled its intent to waive sovereign immunity as to that procedure but not as to suit in state court. *See* Pet. App. 39a. Nothing in *Ramsey* remotely casts doubt on Hawaii's sovereign prerogative to make that choice.

Kentucky v. United States, 424 F.3d 1222 (Fed. Cir. 2005), upon which petitioners also rely, is even further removed from this case. Unlike this litigation, which involves a statutory provision (20 U.S.C. § 107d-1(a)) applicable to claims brought by individuals against a state, *Kentucky* involved a quite different provision (20 U.S.C. § 107d-1(b)) applicable to claims brought *by* a state against the United States for violation of the federal government's obligations under the Act. The Federal Circuit determined that Kentucky's complaint under 20 U.S.C. § 107d-1(b) alleged a violation of the Act, but it *rejected* the state's argument that the hearing-arbitration-review procedure of that section was merely discretionary. It thus *affirmed* the trial court's dismissal of the complaint for lack of subject matter jurisdiction resulting from Kentucky's non-compliance with that procedure.

That outcome is perfectly consistent with the decision below; if anything, it is analogous to the Hawaii Supreme Court's treatment of claims arising under section 107d-1(a). And although the Federal Circuit remarked in dicta that the Act "was not meant to 'funnel every complaint' into federal arbitration," Pet. 14 (quoting *Kentucky*, 424 F.3d at 1226), the court was addressing section 107d-1(b),

which applies to state claims against the federal government, not the quite different provision at issue in this case, which applies to individual claims against a state. The Federal Circuit did not address the availability of the hearing-arbitration-review procedure to individual licensees who contest state decisions related to non-federal property.

Finally, petitioners assert that, *on paper*, statutes or administrative rules in several states are at odds with the decision of the Supreme Court of Hawaii. (Pet. at 15-17). These statutes and rules have been litigated lightly, if at all, and petitioners cite no state judicial decisions in conflict with the decision below.[3] Again, moreover, Hawaii affirmatively prefers the use of the hearing-arbitration-review procedure instead of ordinary state-court litigation for these purposes, and other states may express a contrary preference as a matter of state law.

III. The Decision Below Is Correct On The Merits

As discussed, certiorari is unwarranted, first, because state law offers an adequate and independent ground for the judgment below; and, second, because even if the federal-law portion of the decision is viewed in isolation, it does not conflict with the decision of any other court. In any event, that portion of the decision below is also correct

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[3] Petitioners do briefly mention (Pet. 16) several cases that involved state-court litigation under state counterparts to the federal Act. As petitioners apparently recognize, however, the decisions in those cases do not address any legal issue similar to the question presented here. In addition, the cited decisions are all more than twenty years old, and all but one were issued by lower state courts.

on the merits. Petitioners' contrary argument misunderstands key aspects of this federal-state partnership.

Neither the licensing provisions nor the dispute resolution provisions of the federal Randolph-Sheppard Act are limited to federal properties. Exactly the opposite is true. The federal Secretary of Education is authorized to designate the SLA to issue licenses to blind persons to operate vending facilities on "federal *and other*" property. 20 U.S.C. § 107a(a)(5) (emphasis added). Although the federal Act does not define "other property," both the federal regulations and the Hawaii administrative rules do.[4] The "other" in the term "federal and other" means "non-federal." In Hawaii, the non-federal "other" properties comprise state properties, county properties, and one private property. State Appeal Appx. 19.

In addition, the federal dispute-resolution procedure applies to "*any blind licensee*" who is dissatisfied with the operation or administration of the vending facility program. 20 U.S.C. § 107b(6); 20 U.S.C. § 107d-1(a) (emphasis added). The critical concept here is license, not location. "Blind licensee" is by definition "a blind person *licensed* by the State licensing agency to operate a vending facility on Federal *or other property*." 34 C.F.R. § 395.1(c) (emphasis added); *see also* Haw. Admin. R. § 17-402-17(a) (same). It is thus not even possible to differentiate between blind

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[4] *See* 34 C.F.R. § 395.1(n) ("*Other property* means property which is not federal property and on which vending facilities are established or operated by the use of any funds derived in whole or in part, directly or indirectly, from the operation of vending facilities on any Federal property."); Haw. Admin. R. § 17-402-17(a) ("'Other property' means property which is not federally controlled property and on which vending stands are established or operated.").

licensees based on assignment to federal property or to other property. There are more licensees than there are vending locations, and at any given time there are licensees who are unassigned to any property.[5] And grievances are frequently filed by former vendors whose licenses have been terminated and who consequently are unassigned to any property.

Likewise, each SLA licenses one unitary corps of blind licensees. The license is not restricted by specific location or by property ownership. Rather, the license authorizes the licensee "to operate a vending facility on Federal *or other property*." 34 C.F.R. § 395.1(i) (emphasis added); Haw. Admin. R. § 17-402-17(a). A licensed blind vendor may, without change of license, seamlessly transfer from "federal" property to "other" and vice-versa. During the pendency of the circuit court proceedings in this case, for example, one Hawaii blind vendor moved from the private property to a federal property, one moved from a state property to a federal property, and one moved from a federal property to a state property. (State Appeal Appx. 19).

For similar reasons, petitioners' position here would be arbitrary and inefficient in application. When this action commenced, petitioner Toyama was assigned to a federal property, and the other petitioners were assigned to state and county properties. (State Appeal Appx. 19). As the circuit court complaint reflects, all petitioners were

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[5] A license merely authorizes a blind person to operate a vending facility on *Federal or other property*. 34 C.F.R. § 395.1(i); Haw. Admin. R. § 17-402-17(a). In contrast to a blind licensee, a blind *vendor* is licensed *and* is actually operating a vending facility on federal or other property. 34 C.F.R. § 395.1(aa); Haw. Admin. R. § 17-402-17(a).

dissatisfied with exactly the same actions of exactly the same vending facility program. Under petitioners' theory of the case, the hearing-arbitration-review procedure applied only to petitioner Toyama (although he did not follow it), but not to the eight other petitioners who were similarly dissatisfied. Petitioners' theory thus invites waste and potential inconsistency of outcome. That is why Hawaii embraces the use of the same hearing-arbitration-review procedure for all claims, whether they arise from actions concerning federal or state property.[6]

Finally, petitioners' position anomalously presupposes that seven consecutive Secretaries of Education have exceeded their statutory authority in convening arbitration panels for cases arising on state property. (Pet. at 22-23). The Federal Register is replete with reports of arbitration decisions concerning grievances of blind licensees assigned to non-federal properties.[7] No such decisions

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[6] Petitioners' theory that the dispute resolution procedure applies only to federal properties is based in part on an interpretation of "vending facility program" that excludes non-federal properties. (Pet. at 18-19). This interpretation, not previously asserted in this litigation, contradicts the federal and state definitions that have been in effect for more than a quarter-century. "*Program*" means "all the activities of the licensing agency under this part related to vending facilities on Federal *and other property*." 34 C.F.R. § 395.1(p) (emphasis added).

[7] *See* 70 Fed. Reg. 44592 (2006) (license termination); 69 Fed. Reg. 69692 (2004); 68 Fed. Reg. 36744 (2003); 66 Fed. Reg. 18234 (2001) (license termination); 65 Fed. Reg. 26823 (2000) (license termination); 64 Fed. Reg. 32220 (1999) (license termination); 63 Fed. Reg. 42834 (1998) (license termination); 62 Fed. Reg. 18335 (1997); 60 Fed. Reg. 26724 (1995) (license termination); 60 Fed. Reg. 18396 (1995) (license termination); 59 Fed. Reg. 53641 (1994) (license termination); 59 Fed. Reg. 44134 (1994); 59 Fed. Reg. 38446 (1994) (license termination); 59 Fed. Reg. 37469 (1994) (license termination); 59 Fed. Reg. 32687 (1994); 55 Fed. Reg. 28434 (1990); 48 Fed. Reg. 39280 (1983) (license termination).

should exist under petitioners' theory of the case. Their theory thus violates the longstanding presumption of regularity accorded the public acts of public officials. *See, e.g., National Archives and Records Admin. v. Favish*, 541 U.S. 157, 174 (2003).[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

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[8] Petitioners invoke a single sentence of the 1977 prefatory comments (by the then Department of Health, Education, and Welfare) to the final administrative regulations implementing the 1974 amendments to the federal Randolph-Sheppard Act. Pet. 23. Taken as a whole, however, the agency's 1977 comments do not advance plaintiffs' theory. The agency specifically noted that the Act authorized the Secretary to issue licenses to blind persons "for the operating of vending facilities on Federal and other property" and that the term "vendor" had been specifically defined to "extend to individuals operating facilities on either Federal or other property." 42 Fed. Reg. 15802, 15803.